

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF NEW MEXICO**

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LARRY ALDOFF,

Plaintiff,

vs.

Civil No. 06-651 WJ/RHS

MARTIN CHAVEZ, et al.,

Defendants.

**REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE**  
**REGARDING DEFENDANTS' MOTION TO DISMISS**

THIS MATTER comes before the Court upon “Defendants Martin Chavez and Ronald Torres’ Renewed Motion to Dismiss Plaintiff’s Complaint to Recover Damages for Injury and Memorandum in Support of their Motion to Dismiss” (“Motion to Dismiss”), filed November 13, 2007 [**Doc. No. 39**]. Plaintiff opposes the Motion to Dismiss.<sup>1</sup> The Court finds that Defendants’ Motion to Dismiss is well-taken in part and recommends that it be granted in part.

Defendants contend that “[t]he only claim Plaintiff could have against either Defendant Chavez or Defendant Torres is for supervisor liability.” (Motion to Dismiss at 2). Defendants argue that “Plaintiff’s Complaint should be dismissed because he fails to state any knowledge or acquiescence by Defendants Chavez and Torres as required to establish supervisor liability under 42 U.S.C. § 1983.” (Motion to Dismiss at 2). Defendants also contend that “Plaintiff fails to allege that Defendants Chavez and Torres personally participated in the alleged constitutional

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<sup>1</sup>On December 10, 2007, Plaintiff submitted “Plaintiff’s Motion in Opposition to Defendant’s Motion to Dismiss” (“Response”) [**Doc. No. 41**]. Defendants move to strike the Response as untimely. (See Motion to Strike, filed Jan. 9, 2008 [**Doc. No. 42**]). However, because the Response was not helpful in addressing the issues raised in the Motion to Dismiss, the Court did not consider it in reaching its conclusions. Thus, the Court recommends that the Motion to Strike be denied as moot.

violations.” (Motion to Dismiss at 4). In this way, Defendants apparently argue that Plaintiff fails to allege a basis for holding either Defendant Chavez or Defendant Torres individually liable under § 1983. The Court agrees and, thus, recommends that Plaintiff’s § 1983 claims against Defendant Chavez and Defendant Torres in their individual capacities be dismissed.

However, Defendants do not address whether Plaintiff’s § 1983 claims against Defendants in their official capacities should be similarly dismissed.<sup>2</sup> The caption of Plaintiff’s Complaint does not specify whether Defendant Chavez and Defendant Torres are named in their individual capacities, official capacities, or both. However, a review of the substance of Plaintiff’s Complaint, indicates that Plaintiff is suing Defendants in both their individual and official capacities.

For example, on one hand, Plaintiff seeks punitive damages, which are not available under § 1983 against a defendant in his official capacity. See Pride v. Does, 997 F.2d 712, 715 (10th Cir.1993) (citations omitted). On the other hand, Plaintiff specifically identifies Defendants Chavez and Torres by their official titles, complains of an “illegal practice” at Bernalillo County Metropolitan Detention Center that allegedly deprived him of access to his funds, and seeks injunctive relief to “revise and correct the illegal and unconstitutional practice,” implying an official capacity action.<sup>3</sup> (Complaint at Parts V, VI). Accordingly, the Court concludes that Plaintiff’s § 1983 claims against Defendants Chavez and Torres in their official

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<sup>2</sup> “[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.” Monell v. New York City Department of Social Services, 436 U.S. 658, 690 n.55 (1978).

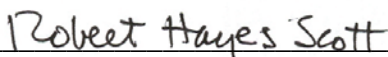
<sup>3</sup> “Plaintiffs seeking to impose liability on a municipality under section 1983 must identify a municipal ‘policy’ or ‘custom’ causing their injury.” Marshall v. Columbia Lea Regional Hospital, 345 F.3d 1157, 1177 (10th Cir. 2003) (citation omitted).

capacities should not be dismissed at this time.

### **Conclusion**

The Court concludes that “Defendants Martin Chavez and Ronald Torres’ Renewed Motion to Dismiss Plaintiff’s Complaint to Recover Damages for Injury and Memorandum in Support of their Motion to Dismiss” [Doc. No. 39] should be **granted in part** and Plaintiff’s § 1983 claims against Defendant Martin Chavez and Defendant Ronald Torres in their individual capacities should be **dismissed**. Plaintiff’s § 1983 claims against Defendants Chavez and Torres in their official capacities should not be dismissed at this time. The Court recommends that Defendants’ Motion to Strike [Doc. No. 42] be **denied** as moot.

Within ten (10) days after a party is served with a copy of these proposed findings and recommendations that party may, pursuant to 28 U.S.C. § 636(b)(1), file written objections to such proposed findings and recommendations. A party must file any objections within the ten (10) day period allowed if that party wants to have appellate review of the proposed findings and recommendations. If no objections are filed, no appellate review will be allowed.

  
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ROBERT HAYES SCOTT  
UNITED STATES MAGISTRATE JUDGE